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In The

Supreme Court of the United States

UNUM LIFE INSURANCE COMPANY OF AMERICA AND UNUMPROVIDENT CORPORATION,

Petitioners,

v.

JANCYE H. TIERNEY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Eighth District Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether multiple owners of a corporate employer are considered employees for purposes of determining whether a benefit plan sponsored by the corporation is governed by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §1001, *et seq.* ("ERISA") where the plan covers one or more of the joint owners but no non-owner employees.

CORPORATE DISCLOSURE STATEMENT

UNUMProvident Corporation is a publicly traded company. UNUMProvident Corporation owns 10% or more of the stock of UNUM Life Insurance Company of America. UNUM Holding Company also owns 10% or more of the stock of UNUM Life Insurance Company of America. UNUM Holding Company is not publicly traded. UNUMProvident Corporation and UNUM Life Insurance Company of America are hereinafter collectively referred to as "Unum."

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PETITION FOR WRIT OF CERTIORARI

This case presents an issue closely related to the issue in *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 2004 U.S. Lexis 1836 (March 2, 2004), *i.e.* the employee status of working owners of corporate plan sponsors under ERISA. In *Yates*, this Court held that a sole shareholder is an employee/participant under ERISA where the sole shareholder participates in a plan that also covers at least one non-owner employee even though the sole shareholder might also be considered an employer under the statute. *Yates* was based in part on statutory provisions that reflect congressional intent that working owners be permitted to participate in ERISA-governed benefit plans and in part on Department of Labor regulatory and interpretive guidance that confirm this intent.

The statutory provisions relied on in *Yates* likewise reflect congressional intent that *joint* shareholders be permitted to participate in ERISA plans. *See, e.g., Yates,* 2004 U.S. Lexis 1836, *27 ("In sum, Title I's provisions involving loans to plan participants, by explicit inclusion or exclusion, assume that working owners – shareholder-employees, partners, and sole proprietors – may participate in ERISA-qualified benefit plans."). Moreover, the same Labor Department regulation referenced in *Yates* and accompanying agency advisory opinions dictate that where a corporate plan sponsor is owned by *multiple* working owners (as opposed to a sole owner and his/her spouse), the working owners who participate in the plan are considered employees, bringing the benefit plan within ERISA, regardless of whether any non-owner employees are also covered by the plan. The regulatory distinction between sole shareholders (who are employees under

ERISA only where at least one non-owner employee also participates in the benefit plan) and joint shareholders (who are employees under ERISA regardless of whether any non-owner employees participate in the benefit plan) recognizes that while sole shareholders have little or no need for ERISA's protections absent participation by non-owner employees, the same is not necessarily true with joint shareholders, particularly where ownership is diluted and a shareholder may have no more control over the corporation or a corporation-sponsored benefit plan than non-owner employees.

Ignoring statutory and Labor Department guidance that this Court found so helpful in *Yates* and deciding this case without the benefit of *Yates*, the Court of Appeals of Texas held that the respondent, who was one of several working owners of the corporate employer, was an employer and not an employee under ERISA. The state court then held that to the extent the corporation's disability plan only covered respondent and other joint shareholders, it would not be governed by ERISA. *Yates*, in combination with express Labor Department guidance on the issue, dictates that the respondent was an employee under ERISA and that the disability plan under which she now seeks benefits is governed by ERISA. As the case presently stands, not only is the state court decision contrary to the reasoning in *Yates*, but it also furthers a split among the federal circuit courts and between the federal circuit courts and the highest courts of several states on this very issue. The potential for this split to broaden continues as cases involving the same issue are currently pending in the Ninth and Fifth Circuits.

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the Court of Appeals for the

Eighth District of Texas to resolve the conflict between the lower court decision and this Court's decision in *Yates* and to resolve the split in the lower courts. Alternatively, petitioners respectfully pray that the Court grant the writ, overturn the judgment below and remand this matter to the Court of Appeals for the Eighth District of Texas for reconsideration in light of *Yates*. Not only would the latter approach allow the lower court to benefit from the guidance of *Yates* and Labor Department interpretation that this Court relied on in *Yates*, it would also allow time for other lower courts (including the Ninth and Fifth Circuits) to decide this issue in the wake of *Yates* with the potential that *Yates* will assist the lower courts in repairing the current split in authority.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals for the Eighth District of Texas, filed on January 30, 2003, is reported at 97 S.W.3d 842, and is reproduced at Appendix ("App.") 1-10. The Supreme Court of Texas denied review on December 12, 2003, which decision is unreported and is reproduced at App. 21. The decisions of the trial court are reproduced at App. 11-20.

JURISDICTION

Respondent filed this action in the District Court of Dallas County, Texas, Fourteenth Judicial District as a suit for damages arising from a decision by Unum to deny respondent's claim for long term disability benefits under a group disability policy issued by Unum to respondent's

employer.[1] On February 4, 2002, the trial court granted partial summary judgment to Unum on the ground that the disability policy was part of an ERISA-regulated employee benefit plan and ruled that respondent's state law claims were preempted. On April 18, 2002, the trial court granted summary judgment to Unum on the ground that Unum's decision to deny respondent's claim for benefits was not arbitrary and capricious under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). Respondent appealed to the Texas Court of Appeals. On January 30, 2003, the Court of Appeals reversed the trial court summary judgment, holding that to the extent the disability policy constituted two benefit plans providing separate coverage to respondent and other joint owners of the corporation, it would not be governed by ERISA. The Court of Appeals remanded the matter to the trial court for resolution of what the Court of Appeals considered to be a disputed issue as to whether there was a separate plan covering the respondent and other owners. Unum sought discretionary review by the Supreme Court of Texas. On December 12, 2003, the Supreme Court of Texas denied Unum's petition for review. This Petition is being filed within the ninety-day period following entry of that order pursuant to Sup.Ct.R. 13.1 and 13.3. This Court has jurisdiction to review the state court judgment under 28 U.S.C. §1257(a) because the decision on review involves a title, right, privilege, or immunity claimed under the

[1] The state trial and appellate courts had jurisdiction of this matter. ERISA specifically grants concurrent jurisdiction to state and federal courts to adjudicate disputes over a participant's entitlement to benefits under an ERISA-governed benefit plan. ERISA, section 502(e)(1) [29 U.S.C. §1132(e)(1)].

statutes of the United States. Specifically, this case involves the construction and application of ERISA.

STATUTES INVOLVED

This case involves sections 3(1), 3(3), 3(6), 502(a), and 514(a) of ERISA, 29 U.S.C. §§1002(1), 1002(3), 1002(6), 1132(a), and 1144(a). The text of these statutes is set out in App. 22-24.

STATEMENT OF THE CASE

It is of paramount importance to employers, plan administrators, claim administrators, fiduciaries, participants, and beneficiaries to have a clear rule to determine when an employee benefit plan is governed by ERISA. The issue in this case is whether multiple working owners of a corporate employer are considered employees under ERISA for purposes of determining whether a plan that covers the working owners is governed by ERISA. The answer to this question lies in the same Department of Labor regulation, 29 C.F.R. §2510.3-3 (2003), that this Court relied on in *Yates* to hold that a sole shareholder is an employee under ERISA. The only difference between this case and *Yates* is that in *Yates* the Labor Department regulation required that because the employer was owned by a sole shareholder, at least one non-owner employee needed to be covered by the plan in order for the plan to be governed by ERISA. In this case, the same Labor Department regulation and agency interpretation of the regulation provide that because the corporate plan sponsor is owned by two or more shareholders who are not spouses of one another, the

joint shareholders are considered employees under ERISA for purposes of determining whether the plan is governed by ERISA, regardless of whether any non-owner employees participate in the plan.

Respondent was one of several shareholders of Special Insurance Services, Inc. ("Corporation"). The Corporation sponsored an employee disability program, the benefits of which were funded by a group policy of long term disability insurance issued to the Corporation by Petitioner UNUM Life Insurance Company of America. Respondent was covered under the policy, as were other shareholder/employees and certain non-owner employees. In August 1998, respondent filed a claim for disability benefits. After benefits were paid for a time, Unum determined that respondent did not qualify for further benefits.

Respondent sued Unum, alleging breach of contract and other claims. After unsuccessfully attempting to remove the case to federal court, Unum filed a motion for summary judgment in the state trial court. The trial court granted Unum's motion in part, ruling that respondent's disability coverage was part of an ERISA-governed employee benefit plan and that respondent's state law claims were preempted by ERISA. App. 14-19. The trial court rejected respondent's argument that her coverage was part of a plan that was separate from the coverage provided to non-owner employees of the Corporation. App. 16-17. Although the trial court initially denied Unum's motion for summary judgment on the reasonableness of its decision to terminate respondent's benefits, the court eventually granted a second motion for summary judgment filed by Unum, ruling that Unum's decision was not arbitrary and capricious and must be upheld as a matter of law. App. 12-13.

Respondent appealed. On January 30, 2003, the Court of Appeals overturned the summary judgment and remanded the matter to the trial court for further proceedings. App. 1-9. The Court of Appeals held that if there was a separate plan covering only respondent and other joint shareholder/employees of the Corporation, such a plan would not be regulated by ERISA:

> In both the trial court and this Court, Tierney argued that SIS's disability insurance consisted of two separate plans – one for employees and one for owners – and therefore her coverage under the owner plan did not fall under ERISA. The Fifth Circuit has held that a plan in which the only participants are non-employees, such as owners or partners, does not constitute an ERISA benefit plan . . . In contrast, where a plan covers both employees and owners the plan is subject to ERISA and its complete preemption doctrine . . . We must thus determine whether a fact question exists as to whether UNUM's policy created two truly independent plans.

App. 6-7. The Court of Appeals then held that there was a disputed issue of material fact as to whether there was a separate plan covering only the joint shareholders and remanded the matter to the trial court to resolve this issue. App. 8. Unum petitioned the Supreme Court of Texas for discretionary review of the ERISA issue. Unum's petition was denied on December 12, 2003. App. 21.

REASONS FOR GRANTING THE WRIT

The Court of Appeals should have held that the disability plan would be governed by ERISA, even if there was a separate plan covering only the joint shareholders. This holding would have negated any need for further factual development of whether or not there was a separate plan. Respondent opposed Unum's petition for review in the Texas Supreme Court, arguing that the court had no jurisdiction to review the appellate court's holding on federal law and that this issue was not significant to Texas jurisprudence. Respondent suggested that this issue should be reviewed only by this Court.

The Court of Appeals decision on the inapplicability of ERISA to plans covering joint owners is wholly at odds with the reasoning of this Court in *Yates* and with Labor Department regulatory and interpretive authority that the Court found influential in *Yates*. Moreover, although the state court decision is consistent with decisions by the Ninth Circuit (reaffirmed as recently as February 2004) and the Massachusetts Supreme Judicial Court, it is directly in conflict with decisions by the Third, Sixth, and Tenth Circuits. Resolution of these conflicts is necessary to restore the uniform regulation of employee benefit plans that Congress intended by enacting ERISA.[2]

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[2] The authority cited by the Texas Court of Appeals for the holding that joint shareholder/employees are not considered employees under ERISA and that a plan covering joint shareholder/employees is not governed by ERISA does not support that holding. *Meredith v. Time Ins. Co.*, 980 F.2d 352 (5th Cir. 1993) held that ERISA did not apply to a health plan where the plan sponsor was a sole proprietorship and the only participants were the owner and her spouse. *Id.* at 357-58. *McNeil*

(Continued on following page)

I. THE COURT SHOULD GRANT REVIEW BECAUSE THE STATE COURT DECISION CONFLICTS WITH THIS COURT'S DECISION IN *YATES*.

In *Yates*, this Court held that a sole shareholder is a participant under ERISA where the sole owner participates in a benefit plan that also covers one or more non-owner employees. The Court expressly endorsed the Labor Department's position as stated in certain advisory opinions interpreting the Department's regulation at 29 C.F.R. §2510.3-3. This Court has previously stated that formally enacted agency regulations are entitled to deference. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In *Yates*, the Court held that an agency's advisory opinions "reflect[] a 'body of experience and informed judgment to which courts and litigants may properly resort for guidance,'" 2004 U.S. Lexis 1836, *32, and that such interpretations "merit[] the Judiciary's respectful consideration," *Id.* at *37.

The Labor Department regulation in *Yates* "addresses . . . what plans qualify as 'employee benefit plans' under Title I of ERISA." 2004 U.S. Lexis 1836, *37. The regulation

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v. Time Ins. Co., 205 F.3d 179 (5th Cir. 2000), *cert. denied*, 531 U.S. 1191 (2001) held that a health plan covering one partner and one non-owner employee was governed by ERISA and noted that a plan covering only the partner would not be governed by ERISA. *Id.* at 190, n. 17. *Parker v. Parker*, 897 S.W.2d 918 (Tex. App. 1995) held that a benefit plan that covered a sole owner and his spouse was not governed by ERISA. All of these decisions are consistent with the Labor Department regulation and interpretive authority. Unlike this case, none of the cases cited by the Texas Court of Appeals involved plans covering one or more joint shareholders of a corporate employer.

excludes from ERISA those plans that do not cover *any* employees:

> For purposes of Title I of the Act and this chapter, the term 'employee benefit plan' shall not include any plan, fund, or program . . . under which *no employees* are participants covered under the plan . . . For example, a so-called 'Keogh' or 'H.R. 10' plan under which *only partners or only a sole proprietor* are participants covered under the plan will not be covered under Title I. However, a Keogh plan under which one or more common law employees in addition to the self-employed individuals are participants covered under the plan, will be covered under Title I.

29 C.F.R. §2510.3-3(b) (emphasis added). The regulation then states that, for purposes of determining whether a corporation-sponsored plan covers at least one employee (and is therefore governed by ERISA), one cannot consider the owner of the corporation an "employee" where coverage is limited to the owner and *where the corporation is wholly owned by the covered owner or by the owner and his spouse*:

> For purposes of this section:
>
> (1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, *which is wholly owned by the individual or by the individual and his or her spouse*. . . .

Id. at §2510.3-3(c) (emphasis added). For purposes of determining whether a plan covers at least one employee and is therefore governed by ERISA, the regulation excludes *only* sole owners or the equivalent of sole owners

(i.e. where a company is owned by an individual and his/her spouse).

Nothing in the Labor Department regulation excludes from employee status *joint* owner/employees of a corporation who are not married. Shortly after the Department issued the regulation, it issued an advisory opinion stating that, where a corporation is owned by multiple shareholders who are not married, a plan sponsored by the corporation is governed by ERISA even though the shareholder/employees are the only persons covered by the plan. The specific question posed to the Department was whether a plan would be exempt from Title I of ERISA "if the only participants . . . are shareholders or spouses of shareholders." Department of Labor Advisory Opinion 76-67, 1976 ERISA Lexis 58 (May 21, 1976). The Department responded that the plan would be exempt from ERISA *only* where the stock of the corporate employer was wholly owned by one shareholder and his/her spouse and the shareholder and his/her spouse were the sole participants in the plan. The Labor Department stated as follows:

> For purposes of Title I of ERISA, the term 'employee benefit plan' does not include any plan, fund, or program . . . under which no employee participants are covered under the plan (section 2510.3-3(b) of the enclosed regulation). According to section 2510.3-3(c)(1), an individual and his or her spouse are not employees with respect to an incorporated business if the business is wholly owned by the individual or by the individual and his or her spouse. *Thus, your interpretation is correct only where the stock of the corporation is wholly owned by one shareholder and his or her spouse and the shareholder or the shareholder*

> *and his or her spouse are the only participants in the plan.*

Id. (emphasis added). The fact that the regulation exempts only plans limited to *sole* shareholders is confirmed by other Labor Department commentary stating that the Department's concern in enacting the regulation was to exclude plans that were limited to a sole owner and his family. *See, e.g.*, DOL Advisory Opinion 95-06A, 1995 ERISA Lexis 31 (May 18, 1995) (regulation excluding plans that do not cover employees only applies where the plan is sponsored by a corporation that is wholly owned by one individual); DOL Advisory Opinion 92-21A, 1992 ERISA Lexis 22 (October 19, 1992) (same); DOL Advisory Opinion (Unnumbered), 1985 ERISA Lexis 57 (January 18, 1995) ("regulation section 2510.3-3(c) excludes *certain* owner-employees from the term 'employee' in regulation section 2510.3-3") (emphasis added); DOL Advisory Opinion 81-88A, 1981 ERISA Lexis 31 (July 9, 1981) ("The provisions of 29 C.F.R. §2510.3-3(c)(1) apply, in the case of a corporation, only where a trade or business is wholly owned by an individual or by an individual and his spouse").

The working owner in *Yates* was a sole shareholder. Under the express terms of the Labor Department regulation, the sole shareholder was not considered an "employee" for purposes of determining whether the pension plan in that case was governed by ERISA. However, because the plan also included certain non-owner employees, the pension plan was governed by ERISA. Once the plan was governed by ERISA, this Court held that all persons participating in the plan, including the sole shareholder, were considered participants under ERISA. 2004 U.S. Lexis 1836, *41.

The facts in this case are slightly different than in *Yates,* but are no less subject to the express terms of the Labor Department regulation and agency interpretations of the regulation. In the present case, the Corporation was not wholly owned by one person nor was it wholly owned by two persons who were spouses. Under the Labor Department regulation, the joint owners of the Corporation were not excluded from consideration as "employees" for purposes of determining whether the plan was governed by ERISA. Any benefits provided to the respondent and other joint shareholder/employees are therefore not excluded from ERISA, even if the plan covering the working owners was separate from any plan covering non-owner employees.

Although Unum cited the Labor Department regulation in its briefs, the Court of Appeals ignored the regulation. More to the point, it did so without the benefit of this Court's decision in *Yates.* This Court's decision in *Yates* clarifies the importance of the Labor Department's interpretations and applications of ERISA provisions, including the Labor Department's pronouncements on the specific issue in this case. The Texas Court of Appeals failed to give credence (or even acknowledge) the Department's position. In *Yates,* the Sixth Circuit's failure to take into account the Department's interpretive guidance resulted in reversal of the Sixth Circuit's holding in that case. The same result should apply to the Texas Court of Appeals decision in this case. Petitioner therefore requests that this Court grant review, vacate the judgment below, and remand this matter to the Texas Court of Appeals for reconsideration in light of *Yates.*

II. THE COURT SHOULD GRANT REVIEW TO RESOLVE A DIRECT SPLIT IN THE CIRCUITS AND BETWEEN THE FEDERAL CIRCUIT COURTS AND STATE COURTS OF LAST RESORT ON THE QUESTION PRESENTED.

The Court of Appeals of Texas is not the only court to ignore or misconstrue the Labor Department's position on what types of working owners are considered "employees" for purposes of determining whether a benefit plan is governed by ERISA. The Ninth Circuit and the Massachusetts Supreme Judicial Court have ruled that joint owners are not considered employees under ERISA in *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262 (9th Cir. 1991) and *Ritter v. Massachusetts Cas. Ins. Co.*, 439 Mass. 214, 786 N.E.2d 817 (2003). Respondent expressly relied on *Kennedy* and *Ritter* in her briefs filed in the state courts. The Ninth Circuit recently reaffirmed its position in *Bess v. New York Life Ins. Co.*, 2004 U.S. App. Lexis (9th Cir. February 10, 2004) (unpublished). *Bess* is currently pending on a petition for rehearing *en banc*. The Third, Sixth, and Tenth Circuits have rendered decisions that are directly contrary to the holding of the Court of Appeals of Texas, *Kennedy,* and *Ritter*. *See Leckey v. Stefano*, 263 F.3d 267 (3d Cir. 2001); *Santino v. Provident Life and Acc. Ins. Co.*, 276 F.3d 772 (6th Cir. 2001); *Sipma v. Massachusetts Cas. Ins. Co.*, 256 F.3d 1006 (10th Cir. 2001). Further emphasizing the importance of the issue, argument was heard on March 4, 2004 in a Fifth Circuit case also involving the issue of ERISA governance of plans covering multiple owners of a corporate employer. *Provident Life and Acc. Ins. Co. v. Sharpless*, No. 03-30566 (5th Cir.).

Like the Texas Court of Appeals in this case, the Ninth Circuit in *Kennedy*, *supra*, held that where a corporate

employer was owned by two shareholders who were the only participants in a pension plan, the owners were not considered employees under ERISA and the plan was not governed by ERISA. 952 F.2d at 265. In support of this holding, the Ninth Circuit relied on a misreading of the Labor Department regulation, much like the Sixth Circuit relied on a misreading of the same regulation in *Yates*. *Id.* Based on this misreading, the Ninth Circuit held that "the Plan was not in compliance with ERISA and that the bond issued by Allied is not subject to interpretation under Title I of ERISA." *Id.*

Similarly, the Massachusetts Supreme Judicial Court recently held in *Ritter*, *supra*, that where a disability benefit plan was sponsored by a corporation owned by two shareholders who were not spouses, a claim for benefits filed by one of the working owners was not governed by ERISA. 439 Mass. at 222, 786 N.E.2d at 824. The Massachusetts Supreme Judicial Court did not even mention the Labor Department regulation, but did acknowledge that there is disagreement among the federal circuit courts on the issue. 439 Mass. at 218, 786 N.E.2d at 822.[3]

In contrast to these decisions, the Third Circuit in *Leckey v. Stafano, supra,* held that where a corporate plan sponsor was owned by two shareholders who were not

[3] The reasoning in *Ritter*, like the reasoning of the Texas Court of Appeals in this case, was that a joint owner cannot be both an employer and an employee under ERISA. *Yates* expressly rejected any blanket prohibition of dual status: "Under ERISA, a working owner may have dual status, *i.e.*, he can be an employee entitled to participate in a plan and, at the same time, the employer (or owner or member of the employer) who established the plan." 2004 U.S. Lexis 1836, *29-30.

spouses, the owners, who were the sole participants in the plan, were considered "employees" under ERISA and that the pension plan itself was therefore governed by ERISA. 263 F.3d at 271. The Third Circuit expressly relied on the Labor Department regulation. The Court held that the regulation excluded from ERISA plans that did not cover employees. Relying on the "plain language" of the regulation the Third Circuit held that it was "left to apply the regulation as written." *Id.* The Court held that "[t]he regulation only prevents spouses who wholly own a business from being counted as employees." *Id.* Relying on the Labor Department's 1976 advisory opinion (discussed above), the Third Circuit held that joint shareholders of a corporate employer *are* counted as employees for purposes of determining if a benefit plan is regulated by ERISA, even though the employees are also owners of the corporation that sponsors the plan. *Id.*

Likewise, in *Sipma v. Mass. Casualty, supra,* a minority shareholder of a corporate employer was covered under an employee disability plan. No non-owner employees were covered. Referring to the Labor Department regulation's exception from employee status applicable to sole owners, the Court held that: "the exception on its face is limited to individuals (including spouses) who are sole owners of a business. The exception does not extend to exclude multiple shareholders from the definition of 'employee.'" 256 F.3d at 1011. The Court also held that its reading of the regulation was bolstered by the 1976 advisory opinion, making it clear that the Tenth Circuit's reading of the regulation was the same as the Labor Department's reading of the regulation. *Id.* The Tenth Circuit concluded that "[s]ince Mr. Sipma was not the sole shareholder of the corporation, he is not excluded from the

definition of 'employee' for purposes of determining whether an 'employee benefit plan' exists." *Id.* at 1012. The Tenth Circuit noted that its holding conflicted with the Ninth Circuit decision in *Kennedy*, *supra*. *Id.* at 1011.

Finally, in *Santino v. Provident*, *supra*, the plaintiff was one of three shareholders of a medical corporation and was insured under two disability policies that were paid for by the corporation. Santino argued that his policies were not governed by ERISA because he was a joint shareholder and the only person covered under the disability program. The Sixth Circuit disagreed and ruled that the policies were governed by ERISA:

> Section 2510.3-3(c)(1) . . . does not exclude joint shareholders from the ERISA definition of 'employee.' On its face, the regulation applies only to 'an individual' who 'wholly owns' a business. Moreover, the Department of Labor interprets section 2510.3-3(c)(1) as applying *'only* where the stock of the corporation is wholly owned by one shareholder.' Op. Dep't of Labor 76-67 (May 21, 1976) (emphasis added).
>
> . . .
>
> Because Santino is an ERISA 'employee' and the policies provide him with benefits in the event of disability, we find that the policies constitute an ERISA 'employee welfare benefit plan.'

276 F.3d at 775.

Resolution of the current split regarding the employee status of joint working owners under ERISA is no less important than resolution of the issue affecting the sole shareholder in *Yates*. Only a "bright line" definition can give employers, administrators, and other plan entities the

necessary guidance to determine whether a benefit plan is or is not governed by ERISA. These entities cannot afford to wait for litigation or rely on unclear standards because court decisions and clarification of standards in given cases may come too late for these entities to ensure that a given plan is properly administered under the statute. To avoid these uncertainties and to provide ERISA entities with clear guidance on what types of plans are governed by ERISA, the Department of Labor has established a "bright line": (1) where the employer is wholly owned by an individual or by an individual and his or her spouse or where the employer is a partnership, the sole owner or partner are not considered employees for purposes of determining whether the plan is governed by ERISA; (2) where the employer is a corporation owned by multiple shareholders, the multiple shareholders *are* considered employees for purposes of determining whether the plan is governed by ERISA.

The regulatory distinction between sole shareholders and joint shareholders is reasonable. Where a sole shareholder is the only participant in the plan, there is no need for the protections afforded by ERISA because the owner has full control over the plan. Where joint shareholders participate in a plan, the owners do not have the same level of control as a sole shareholder. In fact, in situations where there are a number of shareholders, ownership is diluted and the owners may have virtually no control over the corporation itself or over the benefit plan sponsored by the corporation.

This is not to say that employee status under ERISA should depend on the amount of stock owned by a joint shareholder or on his or her percentage of ownership. Such a rule would create confusion in the administration of

employee benefit plans because administrators would have to determine with respect to each and every plan sponsored by a corporation how much stock is too much for an individual to be considered an employee. Such a rule would also result in the potential for benefit plans to float in and out of ERISA regulation as stock is bought and sold and as ownership percentages change over time.[4]

The question of the status of joint working owners as employees under ERISA is not an isolated issue applicable to only a limited group of employee benefit plans. Rather, the issue affects all types of benefit plans, welfare and pension, insured and uninsured. *Yates* holds that working owners should not be excluded from employee/participant status under ERISA merely because they are owners. The state court's contrary holding in this case could exempt thousands of employees who own stock in their employer from employee status under ERISA. Mere ownership of an employer's stock should not exempt individuals from employee/participant status nor should it remove benefit plans that cover these owners from ERISA.

Finally, exclusion of plans that cover joint owners can also create inconsistency of application within the same plan documents. This case provides a prime example. While the Court of Appeals decision leaves open the

[4] The Labor Department also recognized and confirmed the distinction between partner-only plans, which are exempt from ERISA, and joint shareholder plans, which are governed by ERISA. In explanatory comments, the Department noted that corporate shareholders are included in ERISA, unlike partners, because of the universal distinction between the employee status of working shareholders in corporations and the non-employee status of owners in partnerships. *See* 40 Fed. Reg. 34528 (1975).

possibility that the owners and non-owners might be covered under separate "plans," the record indicates that they are covered under the same policy (and in several situations, the same policy terms). As a result of the Court of Appeals holding, there is the possibility that the respondent's coverage would be governed by state law whereas the coverage applicable to non-owner employees under the same policy would be governed by ERISA. Such a result should be foreclosed by *Yates*: "Excepting working owners from the federal Act's coverage would generate administrative difficulties and is hardly consistent with a national uniformity goal." 2004 U.S. Lexis 1836, *31.

CONCLUSION

For the reasons stated herein, Petitioners respectfully request that this Court grant review and reverse the ruling below.

Respectfully Submitted,

DOUG K. BUTLER

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March 10, 2004

[SEAL]

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

JANCYE H. TIERNEY, Appellant, v. UNUM LIFE INSURANCE COMPANY OF AMERICA and UNUM PROVIDENT CORPORATION, Appellee.	§ § § § §	No. 08-02-00269-CV Appeal from the 14th District Court of Dallas County, Texas (TC# 00-04604)

OPINION

This case involves ERISA[1] preemption of common law claims against a long-term disability insurer. Finding that the trial court erred in ruling that no fact question exists on whether ERISA preempted Tierney's state law claims, we reverse and remand for further proceedings.

Facts

Tierney brought suit against UNUM Life Insurance Company of America and UNUM Provident Corporation ("UNUM") for termination of her disability benefits under a long-term disability plan ("the Plan") purchased by Special Insurance Services, Inc. ("SIS"). Tierney was an

[1] Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1999 & Supp. 2002).

SIS corporate officer and held an ownership interest in the corporation.

In August 1998, Tierney notified UNUM that she was making a claim for long-term benefits after being diagnosed with a digestive disorder, antral duodenal dysmotility. UNUM accepted the claim and began paying plan benefits to Tierney. Fourteen months later, UNUM terminated payments to Tierney. UNUM's reasons for denying Tierney further benefits was its conclusion that her symptoms did not indicate a level of impairment sufficient to preclude her from working and that her disability was based on self-reported symptoms that limited her policy coverage to twelve months. Tierney unsuccessfully challenged UNUM's decision via its administrative process.

Tierney then filed suit against UNUM and the agent who sold SIS the policy, alleging causes of action under the Texas Insurance Code, the Texas Deceptive Trade Practices Act, for breach of contract, and for negligence ("the state law claims"). UNUM sought removal to federal court urging that ERISA completely preempted Tierney's state law claims.

The U.S. District Court remanded the case. In a comprehensive memorandum order, Judge Joe Fish held that UNUM's disability policy was not an employee benefit plan within the meaning of ERISA and that UNUM had thus failed to sustain its burden of proving complete preemption of Tierney's state law claims. Following remand, discovery proceeded in state court. In May 2001, UNUM again attempted to remove the case to federal court and reasserted its ground for removal as complete ERISA preemption of Tierney's state law claims. Tierney filed a motion for remand, which again was granted by

Judge Fish. Judge Fish rejected UNUM's second attempt at removal based on its contention that discovery had revealed new information to support UNUM's ERISA preemption argument.

Following the second remand, UNUM filed a motion for summary judgment in October 2001 making two-tiered argument for entry of judgment in its favor. First, UNUM urged that Tierney's state law claims were completely preempted by ERISA. Second, it claimed that UNUM's decision to deny Tierney's benefit was not an abuse of discretion under ERISA. The trial court agreed that ERISA preemption applied, but denied UNUM judgment on its abuse of discretion ground.

UNUM (having apparently remarshalled its evidence) filed a second motion for summary judgment on the abuse of discretion issue. In the motion it asserted that no abuse was demonstrated because Tierney was not disabled within the meaning of the Plan's provisions, and because Tierney's symptoms were self-reported and therefore subject to the Plan's twelve-month limitation on benefits.

Tierney responded by arguing that the finding of abuse of discretion was a question for the jury. Tierney also filed a cross-motion for summary judgment requesting the trial court find that UNUM had abused its discretion by denying her benefits such that judgment in her favor was appropriate. The trial court granted UNUM's motion for summary judgment and denied Tierney's. This appeal follows.

Standard of Review

We review the trial court's determination that ERISA preempted Tierney's state law claims pursuant to the traditional summary judgment standard of review. We must thus determine whether the movant has sustained its burden to show that it is entitled to judgment as a matter of law or whether material fact issues preclude summary judgment. We view all evidence favorable to the non-movant as true. TEX. R. CIV. P. 166a; *Nixon v. Mr. Property Management Co., Inc.,* 690 S.W.2d 546, 548-49 (Tex. 1985). We are further required to indulge all reasonable inferences in favor of the non-movant, resolving all doubts in her favor. *Id.*

ERISA Preemption

In her first, second, and third issues on appeal, Tierney urges that the trial court erred in finding that UNUM established as a matter of law that the plan in question was an employee welfare benefit plan under ERISA, that UNUM was estopped from arguing preemption based on the federal district court's holding that there was no ERISA plan,[2] and that UNUM did not establish as a matter of law that Tierney's state law claims were

[2] Tierney argues that the federal district court's denial of UNUM's preemption claim was binding on the state trial court under the doctrine of law of the case. She has carried that argument forward in this appeal. The law is to the contrary, however, and thus Tierney's second issue on appeal is without merit. *Soley v. First National Bank of Commerce,* 923 F.2d 406, 410 (5th Cir. 1991); *Sanchez v. Johnson & Johnson Medical Inc.,* 860 S.W.2d 503, 512 n.3 (Tex. App. – El Paso 1993), *rev'd in part on other grounds,* 924 S.W.2d 925 (Tex. 1996).

preempted. We sustain Tierney's first and third issues for the following reasons.

In examining a particular arrangement to determine whether it qualifies as an employee welfare benefit plan under ERISA, we inquire whether: (1) the plan exists within the meaning of ERISA; (2) the plan falls outside the safe-harbor exception established by the Department of Labor; and (3) the plan was established or maintained by the employer for the benefit of its employees. *Meredith v. Time Ins. Co.*, 980 F.2d 352, 355 (5th Cir. 1993). If the record demonstrates these three elements, ERISA preempts all Tierney's state law claims. UNUM's first motion for summary judgment asserted all three grounds for finding ERISA preemption. The trial court ruled in UNUM's favor as to each element. Viewing the record through the prism of summary judgment review, however, we find fact questions exist as to the first prong of the test, and do not reach the remaining two.

ERISA defines an "employee welfare benefit plan" as:

> [A]ny plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment. . . .

29 U.S.C. § 1002(1) (1999). The Plan presented in this case involves disability insurance. To determine whether it

constitutes an employee welfare benefit plan under ERISA, we examine: (1) whether an employer established or maintained the plan and (2) whether the employer intended to provide certain benefits to its employees. *MDPhysicians & Associates, Inc. v. State Board of Insurance,* 957 F.2d 178, 183 (5th Cir.), *cert. denied,* 506 U.S. 861, 113 S.Ct. 179, 121 L.Ed.2d 125 (1992); *Hansen v. Continental Ins. Co.,* 940 F.2d 971, 978 (5th Cir. 1991). Whether a particular set of insurance arrangements constitutes an employee welfare benefit plan is a question of fact. *McNeil v. Time Ins. Co.,* 205 F.3d 179, 189 (5th Cir. 2000); *Zavora v. Paul Revere Life Ins. Co.,* 145 F.3d 1118, 1120 (9th Cir. 1998); *Grainger v. Western Casualty Life Ins. Co.,* 930 S.W.2d 609, 615 (Tex. App. – Houston [1st Dist.] 1996, writ denied).

The burden of establishing the existence of an ERISA plan was on UNUM. *Zavora,* 145 F.3d at 1120. Moreover, UNUM must overcome a presumption against preemption. *Great Dane Trailers v. Estate of Wells,* 52 S.W.3d 737, 743 (Tex. 2001).

In both the trial court and this Court, Tierney argued that SIS's disability insurance consisted of two separate plans – one for employees and one for owners – and therefore her coverage under the owner plan did not fall under ERISA. The Fifth Circuit has held that a plan in which the only participants are non-employees, such as owners or partners, does not constitute an ERISA benefit plan. *McNeil,* 205 F.3d at 190; *Meredith,* 980 F.2d at 357-58; *see Parker v. Parker,* 897 S.W.2d 918, 925 (Tex. App. – Fort Worth 1995, writ denied). In contrast, where a plan covers both employees and owners the plan is subject to ERISA and its complete preemption doctrine. *Vega v. National Life Ins. Servs., Inc.,* 188 F.3d 287, 294 (5th Cir.

1999); *see Taylor v. Carter,* 948 F. Supp. 1290, 1298 (W.D. Tex. 1996) (minority shareholder's role in administering plan constitutes "employer" status under ERISA). We must thus determine whether a fact question exists as to whether UNUM's policy created two truly independent plans.

The summary judgment evidence in this case indicates a single policy was issued by UNUM to SIS to provide long-term disability insurance coverage to SIS's employees and owners. The policy has a single effective date, single plan number, and single plan administrator. Nevertheless, having carefully examined the policy and the law, we must conclude that there is a genuine issue of material fact as to whether UNUM's disability plan constitutes a single plan or two distinct plans, one for employees and one for owners. We reach this conclusion for the following reasons.

Plaintiff Tierney testified that the agent who sold the UNUM policy told her the policy provided different coverages for owners and employees. The Plan clearly contemplates two classes of insured persons, "owners" and "employees." It requires owners to pay for their own coverage, while the company pays all premiums for employees. There are numerous differences in the coverage afforded the two classes: the beginning date for coverage is defined differently; disability is defined differently; benefits are determined differently. "Monthly earnings" are determined differently for owners and employees. The amount UNUM pays if the insured is working differs between the two classes; there are distinctions between how maximum capacity is determined. The effect of disability earnings on benefits is different as well. Payments to the two classes under the "disability plus" rider differ.

The policy provides UNUM is entitled to cancel coverage if less than 75 percent of owners or less than 100 percent of employees participate in the Plan. This distinction is significant, as coverage could be cancelled at UNUM's option if even one employee refused to participate, but would continue without the participation of a quarter of the owner class. Further, the policy language itself invites the conclusion that it contains multiple plans. It refers to initial premiums for "each plan." In defining terms, the policy states that "plan means a line of coverage under the policy." It refers to "limitations, exclusions and requirements that apply within a plan," and provides that UNUM may cancel or modify a plan if eligibility requirements are not met. The policy heads one section "Who can cancel this policy or a plan under this policy?".

Applying the presumptions favoring Tierney as nonmovant in the summary judgment context, and bearing in mind the presumption against preemption as well as UNUM's ultimate burden to establish that an ERISA benefit preempts Tierney's state law claims, we conclude that fact questions are presented as to whether UNUM wrote a policy containing two independent plans. If there are two plans, the one covering Tierney applied to owners only and is not subject to ERISA preemption. We therefore sustain Tierney's Issues One and Three. We need not reach the remainder of her issues on appeal.

Conclusion

We reverse the trial court's grant of summary judgment and remand for further proceedings consistent with this opinion.

/s/ Susan Larsen
SUSAN LARSEN, Justice

January 30, 2003

Before Panel No. 4
Barajas, C.J., Larsen, and McClure, JJ.

[LOGO]

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

JANCYE H. TIERNEY, Appellant, v. UNUM LIFE INSURANCE COMPANY OF AMERICA and UNUM PROVIDENT CORPORATION, Appellees.	§ § § § § § § § § §	No. 08-02-00269-CV Appeal from the 14th District Court of Dallas County, Texas (TC# 00-04604)

JUDGMENT

The Court has considered this cause on the record and concludes there was error in the summary judgment. We therefore reverse the judgment of the court below and remand the cause for further proceedings consistent with this opinion. We further order that appellant recover from appellees all costs of this appeal, for which let execution issue. This decision shall be certified below for observance.

IT IS SO ORDERED THIS 30TH DAY OF JANUARY, 2003.

/s/ Susan Larsen
SUSAN LARSEN, Justice.

Before Panel No. 4
Barajas, C.J., Larsen, and McClure, JJ.

CAUSE NO. 00-04604-A

JANCYE H. TIERNEY,	§	**IN THE DISTRICT**
	§	**COURT**
v.	§	
UNUM LIFE INSURANCE	§	**OF DALLAS COUNTY,**
COMPANY OF AMERICA	§	**TEXAS**
ET AL.	§	
	§	**14TH JUDICIAL**
	§	**DISTRICT**

ORDER GRANTING PLAINTIFF'S MOTION TO DETERMINE ENTITLEMENT TO ATTORNEY'S FEES AND COSTS

The Court, having considered the Plaintiff's Motion to Determine Entitlement to Attorney's Fees and Costs, and having heard argument of counsel, finds that the motion should be granted.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Determine Entitlement to Attorney's Fees and Costs is granted and Defendants shall not recover an award of attorneys' fees and costs in this matter.

All parties shall bear their respective costs.

This Order disposes of all remaining claims and parties and is final.

SIGNED this 4 day of June, 2002.

/s/ Mary Murphy
Judge Presiding

CAUSE NO. 00-04604-A

JANCYE H. TIERNEY,	§	**IN THE DISTRICT**
	§	**COURT OF**
vs.	§	
UNUM LIFE INSURANCE	§	**DALLAS COUNTY,**
COMPANY OF AMERICA	§	**TEXAS**
	§	
ET AL.	§	**14TH JUDICIAL**
	§	**DISTRICT**

ORDER GRANTING THE UNUM DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT

THIS MATTER is before the Court on the Second Motion for Summary Judgment of Defendants Unum Life Insurance Company of America ("Unum Life") and UNUM Provident Corporation (the "Unum Defendants") pursuant to Tex R. Civ. P. 166a, in which the Unum Defendants move for summary judgment on the issue of whether Unum Life abused its discretion in denying Plaintiff's claim for disability benefits. The Unum Defendants claim that the question of abuse of discretion is a question for the Court to determine based upon the evidence and record available to the plan administrator at the time of decision and that summary judgment is appropriate because (1) at the time Unum Life stopped paying benefits to Plaintiff, she was not disabled as defined by the Plan, and (2) Plaintiff's disability, if any, was primarily based on her self-reported symptoms and therefore subject to the 12-month limitation in the Plan. Plaintiff has filed a response in opposition to the motion asserting that the Unum Defendants have failed to conclusively establish compliance with ERISA and that she is entitled to have the jury determine whether the plan administrator's act in denying benefits was arbitrary and capricious. Plaintiff has offered evidence outside the administrative record in support of her opposition. Plaintiff also has filed her Cross Motion for

Summary Judgment requesting summary judgment that the plan administrator abused its discretion as a matter of law.

The Court finds that review of the ERISA plan administrator's decision may not be made de novo and is limited to the information available to the administrator prior to the lawsuit. *Vega v. National Life Insurance Services, Inc.*, 188 F.3d 287, 300 (5th Cir. 1999). The Court must determine whether the administrator abused its discretion and where, as here, the administrator has a conflict of interest, the Court may give less deference to the administrator's decision. *Vega*, *supra*, at 299. The court in *Vega* also rejected any duty by the administrator to conduct a good faith, reasonable investigation. *Vega*, *supra*, at 302.

The Court finds that, even considering the evidence offered by Plaintiff and to which the Unum Defendants have objected, and giving little or no deference to the administrator's decision, the administrator's decision was based upon more than unsupported suspicions, that some concrete evidence exists in the record supporting denial of the claim, and accordingly the Court cannot find an abuse of discretion under the standard stated in *Vega*.

IT IS THEREFORE ORDERED that the Unum Defendants' Second Motion for Summary Judgment is granted.

This order does not dispose of all parties and claims and, accordingly, is not final.

SIGNED this 18 day of April, 2002.

/s/ Mary Murphy
Judge Presiding

CAUSE NO. 00-04604-A

JANCYE H. TIERNEY	§	IN THE DISTRICT COURT OF
V.	§	
	§	DALLAS COUNTY, TEXAS
UNUM LIFE INSURANCE COMPANY OF AMERICA, ET AL.	§	
	§	14TH JUDICIAL DISTRICT

ORDER GRANTING IN PART AND DENYING IN PART UNUM DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THIS MATTER is before the Court on the Motion for Summary Judgment of Defendants Unum Life Insurance Company of America ("Unum Life") and UNUM Provident Corporation ("Defendants') pursuant to Tex. R. Civ. P. 166a, in which Defendants claim that (1) Plaintiff's claims for long term disability benefits are preempted completely by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. ("ERISA") and (2) Unum Life's denial of benefits was not an abuse of discretion as a matter of law.

Legal Elements Related to ERISA Claims.

In analyzing the applicability of ERISA, the court must decide whether (1) a plan exists, (2) the plan falls outside the safe harbor provisions established by the Department of Labor, and (3) the plan was established or maintained by an employer intending to benefit employees. *Meredith v. Time Ins. Co.*, 980 F.2d 352, 355 (5th Cir. 1993).

In determining whether a plan exists under the first *Meredith* factor, the court must determine whether a

reasonable person could ascertain the intended benefits, beneficiaries, sources of financing, and procedures for receiving benefits. *McDonald v. Provident Indemnity Life Ins. Co.*, 60 F.3d 234, 236 (5th Cir. 1995). If any part of the inquiry is answered in the negative, the policy is not a plan governed by ERISA. *Id.* 980 F.2d at 355.

With respect to the second factor of *Meredith*, it is the Plaintiff's burden to prove each of the following four elements of the Department of Labor safe harbor provisions: (1) the company did not pay any of the premiums for coverage, (2) participation by the employees was voluntary, (3) the company's role was limited to collecting and remitting premiums, and (4) the company received no profit from the plan. If Plaintiff cannot establish any of these four elements, the plan falls outside the safe harbor provisions. *McDonald*, 980 F.2d at 355.

Preemption of State Law Claims.

If Plaintiff's state law claims relate to an ERISA plan, they are subject to complete preemption. The preemption clause, 29 U.S.C. § 1144(a), states that ERISA provisions "shall supersede . . . State laws" to the extent those laws "relate to any employee benefit plan." The language of the ERISA preemption is deliberately expansive and has been construed broadly by federal courts. *Hubbard v. Blue Cross & Blue Shield*, 42 F.3d 942, 945 (5th Cir. 1995); *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1328-29 (5th Cir. 1992). The saving clause, 29 U.S.C. § 1144(b)(2)(A), exempts from preemption "any law of any State which regulates insurance."

The key words, "regulates insurance," require interpretation in context. *UNUM Life Ins. Co. v. Ward*, 526 U.S. 358, 363 (1999) (hereinafter "*UNUM v. Ward*").

Plaintiff's Responses.

Plaintiff contends that no qualifying plan exists because (1) two separate plans exist, and (2) the safe harbor provision applies because Plaintiff paid her own premiums and the plan was voluntary. Plaintiff also argues by way of defense that her state law claims under arts. 21.21 and 21.55 of the Texas Insurance code (unfair settlement practices and failure to timely pay a claim) are not preempted, relying on the 1999 Supreme Court case of *UNUM v. Ward*, *supra*. Procedurally, Plaintiff also argues that Defendants are precluded from raising ERISA because of (1) the federal court's prior ruling on the removal petition, and (2) Defendants' failure to mention the ERISA defense in their initial response to Plaintiff's request for disclosure and their failure to assert ERISA initially as a defense in their answer. Plaintiff also argues that summary judgment is improper because Plaintiff is entitled to a jury on all fact questions related to the ERISA claims, including whether a plan exists.

Applicability of ERISA.

The parties do not dispute the facts – their difference lies in the interpretation of the policy and facts related to that policy. The undisputed facts are that (1) one policy exists, but the policy refers to different "plans," (2) "plan" is defined as a line of coverage under the policy, (3) the only line of coverage, regardless of

employee denomination as owner, manager, or employee, is "long term disability," (4) Plaintiff was one of three owner-employees under the policy, (5) the policy expressly provides that owners pay for their own coverage, yet the company paid Plaintiff's premiums, noting those as income on her W-2, (6) owner-employees could elect to participate, but if fewer than 75% of the owner-employees did not participate, the plan as to their coverage terminated, (7) one-owner employees are participants, (8) the company did more than remit premiums in administering the policy, and (9) the policy sets forth information from which benefits, beneficiaries, sources of financing and procedures for receiving benefits may be determined. The plan was to benefit the employees.

The Court finds that the policy in question qualifies as a plan under ERISA, that Defendants have negated at least one or more of the elements which might qualify Plaintiff for the safe harbor provision, and the plan was established for the benefit of employees. Accordingly, Defendants are entitled to summary judgment as to preemption under ERISA. With respect to Plaintiff's argument that a fact question exists for the jury, no factual dispute exists in the summary judgment record as to the essential facts and whether a plan exists under these facts is a matter of law. The Court further finds that Defendants are not precluded from raising their ERISA claims as a result of the federal court's prior ruling on the petition for removal or as a result of their initial response to Plaintiff's request for disclosure of their original answer.

Preemption of Insurance Code Claims.

Under *Cathey v. Metropolitan Life Ins. Co.*, 805 S.W.2d 387 (Tex. 1991), *cert. denied*, 501 U.S. 1232 (1991), the Texas Supreme Court rejected the argument that state laws which provided different or additional remedies to ERISA are not preempted. That case specifically involved Insurance Code art. 21.21 and art. 3.62, the predecessor to art. 21.55. Plaintiff argues that *Cathey* preceded *UNUM v. Ward*, that *UNUM v. Ward* effectively overrules *Cathey*, and that her Insurance Code claims are preserved and not preempted under *UNUM v. Ward*. The case of *UNUM v. Ward* involved California's notice-prejudice rule which precludes a company from denying a claim because it is untimely unless the company can show prejudice resulting from the untimely claim (not at issue in this case or under the Texas statute).

An argument similar to Plaintiff's was rejected by the Northern District of Texas in *Nations Personnel of Texas, Inc. v. American Medical Security*, 2000 U.S. Dist. LEXIS 4070 (N.D. Tex. March 31, 2000). There, the court restated that the Supreme Court in *UNUM v. Ward* did not create any new law for interpreting the words "regulating insurance" under the saving clause, and that the court's prior holding that Insurance Code art. 21.21 is preempted by ERISA has not changed. A plain reading of *UNUM v. Ward* supports the conclusion that the Supreme Court did not change or overrule existing law, and the Court in fact emphasized that its own precedent provides the framework for resolving whether a state law "regulates insurance." That framework is the same precedent relied upon by the Texas Supreme Court, and courts in the Fifth Circuit and the Northern District of Texas.

Based upon the record and applicable law before this Court, it does not appear that *UNUM v. Ward* was meant to change nor has it changed the reasoning of courts in this circuit holding that Insurance Code art. 21.21 does not "regulate insurance" so as to meet the saving clause of 29 U.S.C. § 1144(b)(2)(A). Accordingly, Defendants' motion for summary judgment as to ERISA's preemption of Plaintiff's state law claims should be granted.

Whether Plan Administrator Abused Her Discretion

Under *Vega v. National Life Ins. Serv., Inc.*, 188 F.3d 287 (5th Cir. 1999), the trial court is precluded from receiving evidence to determine whether the plan administrator abused her discretion in denying benefits, even where the administrator is conflicted in making her decision. The court is charged with assessing the factual questions, constrained to the evidence available to the plan administrator. Based upon the incomplete summary judgment record as to the information available to the plan administrator at the time of her decision, summary judgment should be denied on such issue.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants' Motion for Summary Judgment that Plaintiff's claims are preempted under ERISA is granted and all claims asserted in Plaintiff's Second Amended Original Petition are preempted by ERISA.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants' Motion for Summary Judgment that the plan administrator did not abuse her discretion is denied for the reasons set forth herein.

SIGNED this 4 day of February, 2002.

/s/ Mary Murphy
Judge Presiding

[SEAL] **THE SUPREME COURT OF TEXAS**
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December 12, 2003

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RE: Case Number 03-0362
Court of Appeals Number: 08-02-00269-CV
Trial Court Number: 00-04604-A

Style: UNUM LIFE INSURANCE COMPANY OF AMERICA AND UNUM PROVIDENT CORPORATION
v.
JANCYE H. TIERNEY

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

/s/ Andrew Weber
Andrew Weber, Clerk

by Nancy J. Vega,
Chief Deputy Clerk

cc: Ms. Denise Pacheco
Mr. Jim Hamlin

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29 U.S.C. § 1002. Definitions

For purposes of this title:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 [29 USCS § 186[(c)] (other than pensions on retirement or death, and insurance to provide such pensions).

(2) (A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program –

(i) provided retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating

the benefits under the plan or the method of distributing benefits from the plan.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

. . .

(6) The term "employee" means any individual employed by an employer.

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29 U.S.C. § 1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

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29 U.S.C. § 1144. Other laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)]

and not exempt under section 4(b) [29 USCS § 1003(b)]. This section shall take effect on January 1, 1975.

29 C.F.R. § 2510.3-3 Employee benefit plan.

(a) General. This section clarifies the definition in section 3(3) of the term "employee benefit plan" for purposes of title I of the Act and this chapter. It states a general principle which can be applied to a large class of plans to determine whether they constitute employee benefit plans within the meaning of section 3(3) of the Act. Under section 4(a) of the Act, only employee benefit plans within the meaning of section 3(3) are subject to title I.

(b) Plans without employees. For purposes of title I of the Act and this chapter, the term "employee benefit plan" shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the plan, as defined in paragraph (d) of this section. For example, a so-called "Keogh" or "H.R. 10" plan under which only partners or only a sole proprietor are participants covered under the plan will not be covered under title I. However, a Keogh plan under which one or more common law employees, in addition to the self-employed individuals, are participants covered under the plan, will be covered under title I. Similarly, partnership buyout agreements described in section 736 of the Internal Revenue Code of 1954 will not be subject to title I.

(c) Employees. For purposes of this section:

(1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse, and

(2) A partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership.

Department of Labor.

Pension & Welfare Benefit Programs.

P/OPINION 76-67

1976 ERISA LEXIS 58

May 21, 1976

OPINION:

This is in reply to your letter dated January 9, 1976, in which you ask us to confirm your interpretation that if the only participants in a pension or profit sharing plan are shareholders or spouses of shareholders, qualified retirement plans need not comply with any of the reporting requirements of the Employee Retirement Income Security Act of 1974 (ERISA).

For purposes of Title I of the ERISA, the term "employee benefit plan" does not include any plan, fund, or program, other than apprenticeship or other training program, under which no employee participants are covered under the plan (section 2510.3-3(b) of the enclosed regulation). According to section 2510.3-3(c)(1), an individual and his or her spouse are not employees with respect to an incorporated business if the business is wholly owned by the individual or by individual and his or her spouse. Thus, your interpretation is correct only where the stock of the corporation is wholly owned by one shareholder and his or her spouse and the shareholder or the shareholder and his or her spouse are the only participants in the plan.

(2)

No. 03-1299

Supreme Court, U.S.
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In The

Supreme Court of the United States

UNUM LIFE INSURANCE COMPANY OF AMERICA AND UNUMPROVIDENT CORPORATION,

Petitioners,

v.

JANCYE H. TIERNEY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Eighth District Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether a disability insurance plan procured by three owner/managers of an S corporation that covers only the three owner/managers and no non-owner employees is governed by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §1001, *et seq.* ("ERISA")?

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OBJECTION TO JURISDICTION

This Court does not have jurisdiction to consider hearing UNUM's Petition for Writ of Certiorari. UNUM contends that this Court has jurisdiction under 28 U.S.C. § 1257(a) because the decision on review involves a title, right, privilege or immunity claimed under a federal statute. UNUM, however, neglects to address or even mention an essential element of § 1257(a), namely, the express limitation of this Court's jurisdiction to "[f]inal judgments or decrees rendered by the highest court of a State." UNUM omits this essential element because the El Paso Court of Appeals' judgment in this case clearly does not meet the § 1257(a) finality requirement.

The court of appeals' judgment in the case at hand clearly does not qualify as final under a literal reading of the requirement. The court of appeals merely reversed two summary judgments rendered in favor of UNUM and remanded the case for further proceedings consistent with the court's opinion. On remand, Tierney is arguing that there are separate plans for the three owner/managers of the corporation and the nonowner/employees, and that the separate nature of the owners plan negates UNUM's ERISA defense based on three grounds.[1] The state courts,

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[1] In a motion for partial summary judgment filed after remand, Tierney has argued that ERISA does not apply because: (1) the owners plan does not cover any employees (the issue that is the subject of UNUM's Petition to this Court); (2) the owners plan meets the requirements of the safe harbor provisions of 29 C.F.R. §§ 2510.3-1(j)-(4) (1992); and (3) UNUM cannot meet the third prong of the ERISA analysis, namely, whether the owners plan was created or maintained by the employer for the benefit of its employees. See *Meredith v. Time*

(Continued on following page)

including the jury, may decide that there are indeed separate plans and that ERISA does not apply for one or more of the reasons Tierney is arguing. The state courts might ultimately decide that there are separate plans but ERISA applies regardless.[2] It is also possible that the courts might decide over Tierney's objections that there is but one plan covering both owners and employees. In that case, the state courts will have to determine whether Tierney can meet the threshold of recovery under ERISA. Regardless of the ultimate outcome, one thing is certain: the state courts have many issues, both federal and state, to decide before their decision ultimately becomes final under a literal reading of the jurisdictional statute.

Although a plain reading of the finality requirement would preclude the exercise of jurisdiction "where anything further remains to be determined by a State court," this Court has recognized four very narrow categories of exceptions to such a literal reading of the limitation. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477, 95 S.Ct. 1029, 1037, 43 L.Ed.2d 328 (1975). The question then becomes whether this case fits under any of the four very

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Ins. Co., 980 F.2d 352, 355 (5th Cir. 1993). The trial court denied the motion, stating that the issues will be determined at trial.

[2] The fact that the Texas Supreme Court declined to grant UNUM's Petition for Review from the court of appeals' reversal of the summary judgments does not foreclose the possibility that the Texas Supreme Court might hear an appeal from a final judgment in this case. The law of the case doctrine is not absolute, but is to be applied by the appellate courts in a discretionary manner according to the circumstances of each case. See *Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716-717 (Tex. 2003) (holding that the law of the case doctrine does not apply to findings that were clearly erroneous). Therefore, the Texas Supreme Court has not necessarily had its final say on this matter.

narrow categories of exceptions. UNUM has offered this Court no guidance on this issue, instead choosing to stick its head in the sand by pretending that the finality requirement does not even exist. UNUM surely would have briefed the issue and argued for application of one of the exceptions if it believed it could advance a reasonable argument. Having failed to do so, UNUM has opened itself up to the assumption that UNUM did not believe it could make a good faith argument. Indeed, a review of the exceptions reveals that none of them apply here.

It should first be noted that this Court has observed that "in most, if not all, of the cases falling within the four exceptions, not only was there a final judgment on the federal issue for purposes of state-court proceeding, but also there were no other federal issues to be resolved. There was thus no probability of piecemeal review with respect to federal issues." *Flynt v. Ohio*, 451 U.S. 619, 621, 101 S.Ct. 1958, 1960, 68 L.Ed.2d 489 (1981). In the case at hand a number of federal issues remain to be resolved. As noted above, the state courts may need to decide issues regarding the safe harbor regulations, the third prong of the ERISA analysis, and proper application of the sliding scale of reasonableness applicable to administrators operating under a conflict of interest. Review of the isolated issue presented by UNUM in its Petition for Writ of Certiorari will not resolve these other federal issues, thereby creating the real possibility of piecemeal review of federal issues rejected by this Court in *Flynt*. Thus, this Court can and should refuse to exercise jurisdiction over UNUM's Petition on this basis alone without the need to even look at the four exceptions.

In any case, a review of the four exceptions reveals that none applies in the case at hand. The first category of

exceptions includes cases in which "there are further proceedings – even entire trials – yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Cox Broadcasting Corp*, 420 U.S. 469, 479, 95 S.Ct. 1029, 1037. Resolution of the issue UNUM presents to this Court by way of its Petition will not be conclusive on the outcome of this case. As discussed above, Tierney has raised additional alternative grounds to support a finding that ERISA does not apply. Also, no final decision has been made as to whether a separate owners plan exists and, if not, whether Tierney can still recover in the face of ERISA. Most importantly, the Texas Supreme Court has not necessarily had its final say on the issue of whether ERISA would apply to a separate owners plan. Again, that court may still review the issue at the conclusion of the trial below.[3] Thus, the first exception does not apply.

The second category of exceptions includes those cases in which "the federal issue, finally decided by the highest court in the State, will survive and require decision

[3] UNUM wrongly suggests that the Texas Supreme Court may not have jurisdiction to review the ERISA question. Although Tierney did question that court's jurisdiction, UNUM cited the court to *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 397 (Tex. 1979) (holding that the Texas Supreme Court has implied jurisdiction to correct the judgment of a court of appeals that conflicts with the supreme law of the land as expressed by Congress and the United States Supreme Court). Moreover, the Texas Supreme Court apparently agreed with UNUM on the jurisdictional question in that it requested briefing on the merits and ultimately denied the petition instead of dismissing the petition for want of jurisdiction.

regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480, 95 S.Ct. 1029. This exception does not apply for many reasons. For example, as set forth above, Tierney is arguing alternative grounds to defeat UNUM's ERISA defense that are not dependent on the issue presented by UNUM's Petition to this Court. Thus, the Texas courts might hold on a second appeal that ERISA does not apply because the owners plan falls within the safe harbor provisions and not even reach the legal issue UNUM is presenting here. See *Florida v. Thomas*, 532 U.S. 774, 779, 121 S.Ct. 1905, 1909, 150 L.Ed.2d 1 (2001) (holding that the second exception does not apply where on remand an alternative basis may make resolution of the issue unnecessary). It is also possible that the Texas courts could conclude that there is only one plan and ERISA does apply, which would render UNUM's present argument moot. There are many more combinations of possibilities that would render UNUM's present contention moot. Therefore, the second exception fails.

The third category of exceptions is where "the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox*, 420 U.S. at 481, 95 S.Ct. 1029. Again, both the Texas Supreme Court and the court of appeals may still review the federal issue raised by UNUM on a second appeal. See *Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716-717 (Tex. 2003). Therefore, the third exception does not apply.

The fourth and final category includes those cases "where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on

nonfederal grounds, thus rendering unnecessary review of the state court on the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in the state proceedings to come. In these circumstances, if a refusal to immediately review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." *Cox*, 420 U.S. at 482-483, 95 S.Ct. 1029. Once again, this exception depends on the federal issue being finally decided by the state courts, a requirement that is absent in the case at hand. The Texas Supreme Court's refusal to consider the reversal of a summary judgment is by no means final inasmuch as that court may still consider the matter later. Moreover, nothing about the court of appeals' holding could seriously erode federal policy.[4] In *Flynt*, this Court recognized that the cases falling under the fourth exception "involved identifiable federal or constitutional policies which would have been undermined by the continuation of the litigation in state courts." 451 U.S. at 622, 101 S.Ct. 1958. As UNUM recognizes in its briefing, however, state courts have concurrent jurisdiction to adjudicate ERISA claims. Petition for Writ of Certiorari at 4, n. 1. Therefore, continuation of this case in state court, whether ultimately

[4] Indeed, the court of appeals' published opinion has not been cited by any other court (other than the same court of appeals on an issue of state court procedure).

under ERISA or not, will not undermine any federal statutory or constitutional policy. "A contrary conclusion would permit the fourth exception to swallow the rule." 451 U.S. at 622, 101 S.Ct. 1958.

After reviewing the four categories of exceptions, it is not hard to understand why UNUM chose not to argue for application of any of them to the case at hand. What is surprising, however, is that UNUM attempted to invoke this Court's jurisdiction without a candid consideration of this Court's limited jurisdiction in cases arising from state courts. In so doing, UNUM has wasted Tierney's time and resources as well as the precious time and resources of this Court. Tierney respectfully requests that this Court summarily reject UNUM's Petition for Writ of Certiorari for want of jurisdiction.

STATEMENT OF THE CASE

UNUM's Statement of the Case does not fairly and accurately set forth the facts necessary for a proper determination of UNUM's Petition. Therefore, Tierney submits her own statement. In 1997, Jancye Tierney ("Tierney") was one of three (not "several" as stated by UNUM) owner/managers of Special Insurance Services ("SIS").[5] In the Spring of 1997, the owners of SIS decided to procure a long term disability policy through UNUM Life Insurance Company of America ("UNUM"). UNUM

[5] Although UNUM's summary judgment motion did not clearly establish what type of entity SIS is, the record suggests that SIS is an S corporation.

issued a policy that created multiple benefit plans, one for owners and a separate one for non-owner/employees.[6] The plans differed in several different respects, including the source of funding (the owners paid for their coverage while SIS paid for the employees'), the definition of disability, the amount of coverage, and the length of payments. Moreover, the plans were set up to be separate and independent of one another in that one plan could be terminated or modified without affecting the other.

In the Spring of 1998, Dr. John Mathias evaluated Tierney, a single mother, for chronic abdominal pain and constipation. Dr. Mathias performed objective tests on Tierney, which indicated a gastrointestinal motor dysfunction with ampulla of Vator-duodenal wall spasms. In September of 1998, Tierney filed a claim for long-term disability benefits with UNUM on account of her abdominal condition. UNUM determined that Tierney was disabled and accepted her claim in November of 1998.

At the time UNUM accepted Tierney's claim, it believed that she might respond quickly to treatment and return to work within a matter of months. In April of 1999, however, UNUM concluded that Tierney was not likely to improve for quite some time, if ever. UNUM was unwilling to pay Tierney's claim indefinitely and, therefore, it devised a blueprint for terminating Tierney's claim, a scheme totally at odds with UNUM's contemporaneous

---

[6] Throughout its briefing before this Court, UNUM asserts that SIS sponsored the owners plan. This assertion, however, is incorrect. Tierney presented summary judgment evidence that SIS did not sponsor the owners plan. Instead, the owners themselves elected to obtain coverage for their own interests separate from the employees.

conclusion that Tierney's condition was unchanged from the time UNUM had accepted the claim. The plan was to obtain a forensic file review from a GI specialist to determine whether Tierney did indeed have gastric dysmotility disorder. If it was determined that she did *not*, the adjuster concluded that the self-reported symptom limitation[7] would apply. If, however, the review showed that she did have the disorder, then UNUM would conduct surveillance on Tierney in hopes of showing that she was not really disabled.

UNUM conducted surveillance of Tierney in June of 1999, but the surveillance found nothing inconsistent with Tierney's reported condition. In October of 1999, Dr. Kumar Gutta performed an "Independent Medical Examination" of Tierney. Dr. Gutta issued to UNUM a written report of the examination in which he affirmed Dr. Mathias' diagnosis that Tierney was suffering from a gastric dysmotility disorder and recognized the disabling effect of such a condition.

Despite the fact that both prongs of UNUM's plan to terminate Tierney's benefits had failed, UNUM terminated the benefits anyway. Tierney asked UNUM to reconsider its termination, but, in May of 2000, UNUM informed her that it was standing by its decision. Tierney filed the present action in a state district court in June of

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[7] The policy limits to twelve months benefits payable due to disabilities caused by symptoms that are not verifiable using tests, procedures or clinical examinations. The limitation does not apply where the symptoms are associated with a medically diagnosed condition. See *Russell v. UNUM Life Ins. Co. of America*, 40 F.Supp.2d 747 (D.S.C. 1999).

2000. UNUM removed the suit to a federal district court on July 25, 2000, on the ground that Tierney's suit related to a policy of insurance that qualified as an ERISA employee benefit plan and thus, UNUM argued, was subject to complete federal preemption. Tierney filed a motion to remand. On February 12, 2001, the federal district court remanded the action on the basis that UNUM had failed to establish that the insurance policy in question was an employee welfare benefit plan within the meaning of ERISA. UNUM filed a second notice of removal once again based on ERISA. Tierney filed a motion to remand with the federal court, which the federal court granted along with ordering UNUM to pay sanctions for a groundless removal.

Despite the fact that the federal court had determined that ERISA did not apply, UNUM moved for summary judgment in state court based on ERISA preemption. Tierney argued in response that her claim came under a separate plan that covered only owners and not employees and, therefore fell outside of ERISA. UNUM argued that the policy created only one plan covering both owners and employees. The trial court agreed with UNUM, finding that only one plan was created and rejecting Tierney's safe harbor argument as to that plan. The trial court went on to enter two summary judgment orders, one directed to Tierney's state court claims, and the other upholding UNUM's decision to terminate Tierney's disability benefits.

Tierney appealed from these orders, again arguing that the policy created a separate owners plan to which ERISA does not apply. In response, UNUM argued for the first time in the litigation that ERISA applies even to a separate owners plan because the owners are shareholders

of a corporation. The El Paso Court of Appeals rejected UNUM's argument, reversed the summary judgments and remanded the case,[8] holding that UNUM had failed conclusively to establish that ERISA applies to this action. UNUM petitioned the Texas Supreme Court to review the court of appeals' judgment, but the higher court denied UNUM's petition after considering briefing on the merits.

On February 13, 2004, the court of appeals issued its mandate remanding the case to the trial court. Tierney subsequently filed a motion for partial summary judgment asking the trial court to find as a matter of law that Tierney's claim for benefits is made under a separate owners plan. Tierney argued that ERISA does not apply to the owners plan for three independent reasons: (1) the owners plan does not cover any employees; (2) the safe harbor requirements are met when applied separately to the owners plan; and (3) SIS neither created nor maintained the owners plan for the benefit of its employees. The trial court heard the motion on April 6, 2004, and denied it, stating that fact issues remained to be determined by a trial. A jury trial is scheduled for November 29, 2004.

[8] UNUM's suggestion that the court of appeals remanded the case for consideration only of the issue of whether a separate owners plan exists is misleading. The court clearly remanded the case for further proceedings consistent with the opinion and nothing in the opinion limits the scope to that one issue. App. 8, App. 10.

REASONS FOR DENYING THE WRIT

I. THE STATE COURT DECISION DOES NOT CONFLICT WITH *YATES*

UNUM's reliance on this Court's recent opinion in *Yates v. Hendon*, ___ U.S. ___, 124 S.Ct. 1330 (2004) is misplaced. This Court held in *Yates* that a working owner of a professional corporation qualified as a participant of an ERISA pension plan so long as the plan covers one or more employees other than the working owners and their spouses. 124 S.Ct. at 1336. In the case at hand, however, Tierney has never contended and the court of appeals did not hold that Tierney would not qualify as a "participant" should it be determined that the owners plan fell under ERISA. Indeed, the court of appeals expressly recognized that ERISA would apply if the plan covered both employees and owners. App. 6-7; *citing Vega v. Nat'l Life Ins. Servs., Inc.*, 188 F.3d 287, 294 (5th Cir. 1999).

The issue in the case at hand is not whether Tierney would qualify as a participant of the owners plan should it be found to constitute an ERISA plan, but whether the owners plan itself falls under ERISA. Tierney contends that the separate owners plan does not fall under ERISA because the plan covers no employees who are not working owners and because the plan, which is one hundred percent contributory, falls under the safe harbor. The holding in *Yates* does nothing to impact either of these arguments. Indeed, the holding in *Yates* expressly recognizes the fact that the plan must cover at least one employee who is not a working owner in order for the plan to come under ERISA.

In *Yates*, this Court determined that Congress intended working owners to qualify as plan participants

and, therefore, there was no need to resort to the common law to determine the issue. 124 S.Ct. at 1342. Again, the issue of "participant" is distinct from the issue of whether an ERISA plan exists. Not applying ERISA to plans covering only working owners makes sense in the context of ERISA's stated purpose: "Safeguarding the well-being and security of working men and women and to apprise them of their rights and obligations under any employee benefit plan." *Meredith v. Time Ins. Co.*, 980 F.2d 352, 358 (5th Cir. 1993) Where the employee and the owner are one and the same, this need is not present. *Id.* Nothing in *Yates* alters this analysis. Indeed, *Yates* expressly recognized: "Courts agree that if a benefit plan covers only working owners, it is not covered by Title I (of ERISA)." 124 S.Ct. at 1345, n. 6.

UNUM appears to be arguing that *Yates* is important to the case at hand because *Yates* tangentially touches on 29 C.F.R. § 2510.3-3(c)(1), (2), which UNUM contends is controlling in the case at hand. UNUM itself admits, however, that the regulation did not apply in *Yates* because the plan covered other non-owner employees. Moreover, § 2510.3-3(c)(1), (2) should not be applied as narrowly as UNUM suggests. The regulation clarifies that a plan that does not cover any employees does not qualify as an ERISA plan. The regulation states that sole proprietors and partners are not employees. This creates a type of a "safe harbor" that applies regardless of the level of control the owner or particular partner exercises over the enterprise. The regulation does not go on to say that in no case can any other individual be considered an employer.

UNUM relies on a 1976 Department of Labor opinion letter, which answers a question posed by an unnamed party asking for confirmation that a pension or profit

sharing plan whose only participants are shareholders and spouses of shareholders of the employer do not need to comply with the reporting requirements of ERISA. The opinion letter simply quotes section 2510.3-3(c)(1), which provides that an individual owner of a wholly owned incorporated business is not an employee where the stock is owned by the individual or his or her spouse. The letter concludes that the party's position is correct if the company is wholly owned by one shareholder. The regulation does nothing more than provide a safe harbor for sole proprietorships and partnerships. The letter opinion only states that the questioner is not correct in assuming that no reporting is required unless it falls within that safe harbor. It does not state that all other corporations conclusively fall within the ambit of ERISA. To the extent the letter opinion could be read as concluding that the regulation prohibits courts from treating S corporations the same as partnerships and sole proprietorships, the letter opinion would be entitled to no weight whatsoever. This Court has made clear that a letter opinion from the Department of Labor is entitled to "respect," but only to the extent that it has the power to persuade. *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1665, 1663, 146 L.Ed.2d 621 (2000). The reason the Court gave for giving a letter opinion little to no deference is the fact that the letter was not generated with the same deliberative process as regulations and other agency guidelines. *Id.* The 1976 letter opinion does nothing more than parrot back the text of the regulation. It offers no analysis or discussion of intent that could persuade a reasonable person to conclude that the regulation was anything other than a safe harbor.

The regulation expressly provides that partners of a partnership are not to be counted as employees for purposes of determining whether a plan falls under ERISA. Although the record before the court of appeals is not clear, it appears that SIS was an S corporation.[9] An S corporation is a hybrid between a corporation and a partnership. See *Henry v. Champlain Enterprises, Inc.*, 212 F.R.D. 73, 85 (N.D.N.Y. 2003). In fact, with respect to fringe benefits, such as disability insurance, the Internal Revenue Code expressly states that shareholders such as the three owner/managers of SIS are treated as partners of a partnership. See 26 U.S.C. § 1372.[10] Thus, SIS acted as a partnership with respect to the UNUM policy acting through its three owner/managers and the owners should be treated as partners in determining whether an ERISA plan was established. See, e.g., *House v. American United Life Ins. Co.*, 2002 WL 31729483 (E.D. La.) (treating shareholders of a limited liability company as partners for purposes of the ERISA analysis). The result of treating the three working owners of SIS as partners is that the separate owners plan does not cover any non-owner employees and, thus, does not fall under ERISA.

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[9] Tierney has clearly established that SIS is an S corporation in her motion for partial summary judgment filed with the trial court on remand.

[10] That section provides:

> **§ 1372. Partnership rules to apply for fringe benefit purposes**
>
> **(a) General rule.** – For purposes of applying the provisions of this subtitle which relate to employee fringe benefits –
>
> **(1)** the S corporation shall be treated as a partnership, and
>
> **(2)** any 2-percent shareholder of the S corporation shall be treated as a partner of such partnership.

II. THE COURT NEED NOT REVIEW THE STATE COURT DECISION TO RESOLVE ANY CONFLICT BETWEEN THE CIRCUITS AND THE STATE COURTS

UNUM attempts to create a clear conflict among the circuits by relying on an unpublished Ninth Circuit opinion (which does not even address the issue on its face) as well as speculation as to what the Fifth Circuit might decide in a pending appeal. The truth of the matter is that the cases on which UNUM relies for the proposition that joint shareholders are not working owners are now seriously in question in light of this Court's opinion in *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 123 S.Ct. 1673, 155 L.Ed.2d 615 (2003).

The issue decided by this Court in *Clackamas* was whether four shareholder/directors of a professional corporation are to be considered employers or employees of the corporation for purposes of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq*. The ADA applies only to employers who have at least 15 employees. The issue of whether the corporation met the threshold depended on whether the four shareholders were employers or employees. The Court noted that the Ninth Circuit had rejected an economic realities approach on the basis that a corporation should not be permitted to secure the "best of both possible worlds" by being allowed to invoke its corporate status to reap tax advantages and avoid civil liability and then argue that it is more like a partnership in an attempt to avoid the ADA. 123 S.Ct at 1676. Thus, the Ninth Circuit employed the same analysis as the cases upon which UNUM relies in the case at hand.

This Court, however, rejected the Ninth Circuit's strict corporate structure approach. The Court first turned to

the ADA's definition of employee and found it to be identical to ERISA's definition, "an individual employed by an employer." The Court, therefore, turned to *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992), which involved the issue of whether a particular individual was an employee or an independent contractor under ERISA. The Court noted that, as it had explained in *Darden*, Supreme Court cases concerning similar statutory language give "guidance on how best to fill the gap in the statutory text." 123 S.Ct. at 1678. The Court found that *Darden* had adopted a common law approach to determining whether an individual is an employee. The Court found, however, that the factors used in *Darden* were intended to distinguish between an employee and an independent contractor and, therefore, do not apply where the inquiry is whether a shareholder is an employee of an employer. *Id.*

That is not to say that the Court rejected *Darden*'s premise. Indeed, the Court embraced *Darden*'s decision to look to the common law notion of master-servant as offering helpful guidance. 123 S.Ct. at 1679. The Court noted that the focus of the relevant factors in defining the master-servant relationship is control and approved of six factors developed by the EEOC that focus on the "touchstone of control."[11] *Id.* at 1679-80. The Court summed up

[11] These factors are: (1) Whether the organization can hire or fire the individual or set the rules and regulations of the individuals work; (2) whether and, if so, to what extent the organization supervises the individual's work; (3) whether the individual reports to someone higher in the organization; (4) whether and, if so, to what extent the individual is able to influence the organization; (5) whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and (6) whether the individual shares in the profits, losses and liabilities of the organization.

the analysis by declaring that "an employer is the person, or **group of persons**, who owns and manages the enterprise." *Id.* at 1680 (emphasis supplied). Finally, the Court held that, as was the case in *Darden*, the answer to whether a shareholder is an employee or an employer depends on all of the incidents of the relationship and no one factor is decisive. *Id.* Applying the analysis to the facts before it, the Court held that the evidence in the record was not conclusive and, therefore, remanded the case for determination consistent with the Court's holding. *Id.*

Although *Clackamas* arose under the ADA, the same reasoning applies to ERISA. Indeed, the Court relied heavily on the Court's reasoning in *Darden* in deciding to reject the Ninth Circuit's strict corporate structure approach in favor of a control analysis based on economic realities. The reasoning of this Court in *Clackamas* applies in the ERISA context for the same reason the reasoning of *Darden* applied in the ADA context – both statutes use the same definition of "employee." Thus, this Court has firmly rejected the strict corporate veil stance advocated by UNUM in favor of an economic reality analysis focusing on the common law notion of control and, thus, has rejected the reasoning of the cases upon which UNUM relies.

Even if this Court did decide that it can and should grant UNUM's petition and reverse the state court judgment, the state court of appeals may still reach the same conclusion on state court procedural grounds. Tierney argued to the court of appeals that UNUM had waived its joint shareholder argument by not raising that argument first before the trial court. Although the court of appeals apparently ruled on the merits of UNUM's argument, on remand the court could decide that UNUM did indeed waive its argument. See *Stiles v. Resolution Trust Corp.*,

867 S.W.2d 24, 26 (Tex. 1993) (summary judgment may not be affirmed on grounds not specifically set forth in the trial court); *DeWoody v. Rippley*, 951 S.W.2d 935, 942 (Tex.App. – Fort Worth 1997, writ dis'm by agr.) (appellee waived argument not made in connection with summary judgment); *Dickey v. Dickey,* 908 S.W.2d 311, 313 (Tex.App. – San Antonio 1995, no writ) (legal argument not made in support of summary judgment motion may not be raised on appeal); *Ross v. Arkwright Mut. Ins. Co.*, 892 S.W.2d 119, 124 (Tex.App. – Houston [14th Dist.] 1994, no writ) (same). Tierney respectfully submits that this Court should not expend its valuable judicial resources reviewing an issue that has not been properly preserved.

UNUM's argument that plan administrators must have a bright line test for determining whether ERISA applies to a given plan rings hollow. UNUM ignores the fact that determining whether a plan exists is just one of the three prongs of the analysis of whether ERISA applies. The other prongs, the four elements of safe harbor and the issue of whether the employer created or maintained the plan for the benefit of its employees, are fraught with issues of fact requiring discovery and determination by the courts. Thus, even if a bright line test is imposed on the issue of whether a plan exists in the case at hand, an insurer would still have to resolve the factually charged issues of safe harbor and of the employer's intent in order to determine whether ERISA applied to the plan. UNUM offers the Court no rationale to justify sacrificing congressional intent in order to create a bright line test as a minor short cut in an inherently fact-laden area. Indeed, UNUM has no one but itself to blame for developing and marketing a policy that created a separate plan for the owners of an S corporation.

UNUM is also disingenuous in its suggestion that Tierney is in need of ERISA protection. UNUM has attempted to use ERISA as a virtually impenetrable shield to protect itself from any liability for its bad faith denial of the disability benefits Tierney so desperately needs. The three working owners of SIS sought only to purchase disability insurance and were in no need of protection from each other. Again, the three are treated as partners with respect to the provision of fringe benefits to each other and should be treated no differently for ERISA purposes.[12] It is unconscionable for a disability insurer to invoke the safeguarding attributes of ERISA in order to deny a working owner the disability benefits it marketed to her as a separate plan tailored to her needs as a working owner.

The facts in this case reveal an abusive course of treatment of an insured by a disability insurer who assumed it was operating under the protective cloak of ERISA. This scenario is played out across the country in the name of safeguarding workers. The only safeguarding Tierney as a working owner needs in the case at hand is safeguarding from the unreasonable conduct of her disability insurer offered by state insurance laws and regulations. These state law safeguards, however, are exactly what UNUM seeks to deny Tierney through its defensive use of ERISA.

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[12] Indeed, in Texas, owners of a closely held corporation owe each other certain obligations, including fiduciary duties. See *Davis v. Sheerin*, 754 S.W.2d 375, 382-83 (Tex.App. – Houston [14th Dist.] 1988, writ denied). In this way, closely held corporations are very similar to partnerships.

CONCLUSION

For the reasons discussed above, Tierney respectfully urges the Court to deny UNUM's Petition for Writ of Certiorari.

Respectfully submitted,

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In The

Supreme Court of the United States

UNUM LIFE INSURANCE COMPANY OF AMERICA AND UNUMPROVIDENT CORPORATION,

Petitioners,

v.

JANCYE H. TIERNEY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Eighth District Of Texas

REPLY AND SUPPLEMENTAL BRIEF FOR PETITIONERS

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RULE

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REPLY AND SUPPLEMENTAL BRIEF FOR PETITIONERS

This Court has jurisdiction to grant the petition based on the pragmatic approach that the Court has consistently applied to determine finality. The Texas Court of Appeals held that a benefit plan that covers joint shareholders is not governed by ERISA as a matter of law. On remand, the respondent has argued to the trial court that the court of appeals' decision is binding and constitutes law of the case. It is unclear how the respondent can argue in this Court that the issue can be reconsidered by the state courts and, at the same time, argue in the state court that the issue cannot be reconsidered. In any event, under respondent's theory, petitioner will have no opportunity for reconsideration of the federal issue except in this Court. Under the pragmatic approach, the federal issue presented in the petition is final and ripe for consideration.

Two new appellate court decisions issued since the petition was filed provide additional support for granting certiorari. On April 7, 2004, the Ninth Circuit denied rehearing in *Bess v. New York Life Ins. Co.*, 87 Fed. Appx. 661, 2004 U.S. App. Lexis 2233 (9th Cir. February 10, 2004), effectively refusing to revisit its previous decision in *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262 (9th Cir. 1991), which held that joint shareholders are not employees under ERISA. *Bess* reaffirms the lower court split on the issue presented in the petition. On April 9, 2004, in a decision that relied heavily on *Yates v. Hendon*, 124 S.Ct. 1330, 158 L.Ed.2d 40, 72 U.S.L.W. 4219 (2004), the Fifth Circuit held that a joint shareholder is an employee under ERISA and that a disability plan covering joint shareholders is governed by ERISA. *Provident Life & Acc. Ins. Co. v. Sharpless*, ___ F.3d ___, 2004 U.S. App. Lexis 6937 (5th Cir. 2004). The Fifth Circuit decision confirms that *Yates* has a direct impact on the issue in the petition

and supports petitioners' request that this Court summarily reverse the Texas Court of Appeals and remand the matter for reconsideration in light of *Yates*.[1]

I. THIS COURT HAS JURISDICTION TO GRANT THE PETITION.

The Texas Court of Appeals held that benefit plans covering only joint working owners *cannot* be governed by ERISA as a matter of law. On that basis, the court overturned a summary judgment in favor of the petitioners under ERISA and remanded for a determination of whether the disability policy contained one plan or two and, ultimately, for a trial on the merits (under ERISA or state law, depending on the outcome of the first inquiry). Respondent is contending in the trial court that reconsideration of the federal issue is barred by the law of the case doctrine. As things stand at present, petitioners' only practical opportunity to have the federal issue reconsidered is through a petition for writ of certiorari.[2]

Contrary to respondent's argument, this Court has *never* applied a "literal" or "plain" reading of the finality requirement, but has instead applied a pragmatic approach. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 478

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[1] Respondent's waiver argument is meritless given the Texas Court of Appeals' explicit ruling on the merits of the issue. It is because of the appellate court's ruling on the federal issue that respondent has since argued in the trial court that the decision is law of the case and cannot be revisited, even in light of *Yates*.

[2] The Texas Supreme Court's denial of the petition for review indicated that it was not satisfied that the appellate court correctly declared the law, but that the error did not require reversal or that it was not important enough to the state's jurisprudence to require correction. Tex. R. App. P. 56.1(b)(1). Indeed, respondent argued that the Texas Supreme Court need not address the federal law issue because petitioners could ask this Court to address it. It is disingenuous for her to now argue that this Court should not address the issue.

n.7 (1975) (the finality requirement is not administered in "such a mechanical fashion" and "is frequently so close a question that decision of that issue either way can be supported with equally forceful argument, . . . that it is impossible to devise a formula to resolve all marginal cases coming within what might be called the 'twilight zone' of finality.") The pragmatic approach reveals that it is simply not *realistic* to argue that a state court decision is not final merely because the trial court *may* revisit an issue that was expressly decided by a superior court. *North Dakota State Board v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 163 (1973) (the only way for lower court to revisit issue was to "defy its own" superior court); *Johnson v. Muelberger*, 340 U.S. 581, 583 (1951) (upon remand to lower court "for further proceedings not inconsistent with" the higher court, the issue decided by the higher court was no longer open).

To accept respondent's unreasonable speculation as a basis to deny the petition would require the parties to "go through the motions" of a trial and successive appeals to bring the issue of the status of joint working owners under ERISA back before this Court, when *Yates* demonstrates that the reasoning of the Court of Appeals is incorrect. Such an exercise leaves the Texas state courts "operating in the shadow of" a decision, the correctness of which is already placed in "serious doubt" after *Yates*. *Cohn*, 420 U.S. at 486, 508. Given these circumstances, it would be intolerable to leave unaddressed the Court of Appeals' interpretation of the status of joint working owners under ERISA. *See Miami Herald Publ'g, Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974).

Viewing this case through the lens of pragmatic reasoning, there are several bases supporting this Court's jurisdiction. First, jurisdiction is supported because, absent review of the federal issue now, "later review cannot be had." *Cohn*, 420 U.S. at 481. If petitioners win on the merits, the federal issue will be moot. If petitioners do not prevail, respondent is already taking the position in

the trial court that the law of the case doctrine prohibits petitioner from raising the federal issue again. Contrary to her position in this Court that the law of the case doctrine is not absolute, respondent is arguing before the trial court that: "[T]he Court of Appeals' holding . . . is binding on this Court under the law of the case doctrine" and that "[T]he Court of Appeals' opinion mandates the conclusion that, as a matter of law, ERISA preemption does not apply. . . . " [Plaintiff's Motion for Partial Summary Judgment, pp. 9, 11.] If respondent's position in the state court prevails, petitioners will be required to raise the same federal issue before three levels of the state judiciary before they can once again petition this Court. Petitioners are not required to undergo such "fruitless" action before jurisdiction will lie under §1257. *See Pennsylvania v. Richie*, 480 U.S. 39, 48 n.7 (1987).

Second, to the extent the federal issue does not become moot, jurisdiction is also supported by *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). In *First Evangelical*, the California Court of Appeals held that the Just Compensation Clause does not require compensation for "temporary" regulatory takings. 482 U.S. at 310. Because the state court decision neither rejected the allegations of a taking as false, nor held that a regulatory measure could never constitute a taking, the remedial question was "isolated" and therefore final for purposes of §1257. *Id.* at 311-12. As a result, the Court held that "this distinct issue of federal law will survive and require decision no matter how further proceedings resolve the [remaining issue of liability in the case]". Notably, the Court reached this decision despite the fact that the Court's review would not consider whether the state ordinance "actually denied appellant all use of its property," or whether the ordinance was a valid exercise of state authority and that these questions would "remain open" on remand. *Id.* at 313.

Under *First Evangelical*, respondent's argument that a finding in her favor in the state courts could be based on

alternative grounds is irrelevant given that the Texas Court of Appeals' decision has similarly isolated the "joint working owner" question for this Court's consideration. As in *First Evangelical*, the Court of Appeals did not decide that the disability policy was not governed by ERISA or that the policy could never be governed by ERISA. Instead, the Court of Appeals decided the discrete legal issue of whether a plan covering only joint working owners could be governed by ERISA, which issue is ripe for review by this Court.

Jurisdiction is also supported because the federal issue controls the applicable cause of action. *Cohn,* 420 U.S. at 484. The trial court determined that (1) the disability plan was governed by ERISA, (2) respondent's state law causes of action were preempted by ERISA, and (3) petitioner's denial of benefits was not arbitrary and capricious under ERISA. If the Court of Appeals' decision is reversed on the issue presented, the trial court would again find in petitioner's favor on the issue of ERISA preemption because the trial court has already determined that, based on the record, the disability policy met the statutory requirements of an ERISA plan as a matter of law, including the safe harbor issue that respondent contends is still open. Petition, App. 5 (the trial court ruled in favor of Unum on all issues related to whether there was an ERISA plan, including the safe harbor issue). A determination that ERISA does or does not apply controls the applicable cause of action. As a practical matter, reversal of the court of appeals would dictate that respondent's claim is governed by ERISA and not by state law, whereas a denial of review could result in respondent pursuing a state law cause of action.

This Court's refusal to consider immediately the state court decision would also result in the frustration of federal policy, as embodied in ERISA, which this Court so recently noted in *Yates*:

> Congress' aim is advanced by our reading of the text. . . . Treating working owners as participants

> not only furthers ERISA's purpose to promote and facilitate employee benefit plans. Recognizing the working owner as an ERISA-sheltered plan participant also avoids the anomaly that the same plan will be controlled by discrete regimes: federal-law governance for the nonowner employees; state-law governance for the working owner.

124 S.Ct. at 1330.

In summary, the *Cohn* factors, and the question of finality, come down to a question of judicial economy and whether petitioners will have an opportunity to again raise the federal issue. If the petitioners win the case on the merits, whether under federal or state law, the federal issue will never again be ripe for review in this case. In that situation, the published state appellate court case will remain unaltered on the books even though it is a wrong interpretation of the law. On the other hand, if petitioners lose, they will be forced to litigate the entire case to conclusion and in the meantime raise the federal issue in the state trial court, the intermediate state appellate court, and the state supreme court solely for the purpose of preserving the issue for a second attempt at review in this Court. This Court's pragmatic approach to finality makes it clear that such a waste of resources is not the intent of §1257.[3]

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[3] Alternatively, to the extent it provides a separate basis for jurisdiction, this Court has jurisdiction under 28 U.S.C. §2106 to grant certiorari, vacate the Court of Appeals' decision, and remand to the Court of Appeals for further consideration in light of *Yates*, otherwise known to this Court as the GVR order. *See Lawrence v. Chater*, 516 U.S. 163, 166 (1996) ("We fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final.") "[T]he GVR order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices. [This Court] has GVR'd in light of a wide range of developments, including [its] own decisions. . . ." *Chater*, 516 U.S. at 166. A

(Continued on following page)

II. RECENT CIRCUIT COURT DECISIONS CONFIRM THAT THERE IS A SPLIT OF AUTHORITY IN THE LOWER COURTS.

The recent Fifth and Ninth Circuit decisions confirm that the split in the lower courts will continue for the foreseeable future absent intervention by this Court. As things stand presently, the Third, Fifth, Sixth, and Tenth Circuits hold that working joint shareholders are considered employees under ERISA and that a benefit plan covering the joint working owners is governed by ERISA. The Ninth Circuit, Massachusetts Supreme Judicial Court, and the Court of Appeals of Texas hold that joint working owners are not employees under ERISA and that a benefit plan covering working joint owners is not governed by ERISA.

In *Sharpless*, *supra*, a medical corporation provided group disability insurance to all employees of the corporation and individual disability policies issued by Provident only to the shareholder/employees, including Sharpless. *Id.* at *2. In a rescission suit involving her Provident policy, Sharpless argued that the Provident policy was not part of an ERISA plan because the Provident policies were only issued to shareholder/employees. *Id.* at *6. Relying heavily on *Yates* and on Department of Labor regulatory

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GVR will be ordered to improve the "fairness and accuracy of judicial outcomes" in cases that do not merit the Court's plenary review. *Id.* at 168. As discussed *supra*, after the Court of Appeals' decision was entered, this Court decided *Yates* and the Fifth Circuit decided *Sharpless*, relying explicitly on *Yates*. Both *Yates* and *Sharpless* reject the very reasoning relied on by the Court of Appeals in holding that plans covering only joint working owners are not governed by ERISA. Therefore, the Court of Appeals may reject its prior reasoning if given the opportunity for further consideration. For this reason, this Court should invoke its jurisdiction under §2106 to grant review of Unum's petition, reverse the decision of the Court of Appeals, and remand the case to the Court of Appeals for further consideration in light of *Yates*.

and advisory authority, the Fifth Circuit held that because the corporate employer was owned by multiple shareholders and was not wholly owned by an individual and his/her spouse, the working owners were considered employee/participants under ERISA and the Provident coverage issued to the working joint shareholders was governed by ERISA. *Id.* at *9.

In contrast, the Ninth Circuit denied a petition for rehearing in *Bess, supra,* in which the Court held that benefit coverage issued to a fifty percent owner of a corporate employer was not governed by ERISA. The Ninth Circuit expressly relied on the holding in *Kennedy, supra,* in which the Court held that where joint shareholders are the only participants in a corporation-sponsored pension plan, the joint shareholders are not considered employees and the pension plan is not governed by ERISA.

The decisions in *Sharpless* and *Bess* emphasize two key points supporting a writ of certiorari. First, the issue presented in the petition is a timely one. In the past three years alone, the issue has been the subject of decisions in five federal circuit courts, one state supreme court, and one state court of appeals. Second, the issue has fractured the lower courts, creating a hurdle to the national uniformity in benefit plan regulation that Congress intended to accomplish through ERISA. By denying rehearing in *Bess,* the Ninth Circuit has essentially refused to reconsider its holding in *Kennedy* in light of this Court's decision in *Yates.* The Ninth Circuit's action demonstrates that the split in the lower courts will continue for the indefinite future.

III. THE FIFTH CIRCUIT DECISION IN *SHARPLESS* CONFIRMS THE IMPACT OF THIS COURT'S DECISION IN *YATES* ON THE ISSUE PRESENTED IN THE PETITION.

For purposes of the petition, the most important aspect of *Sharpless* is the Fifth Circuit's reliance on the

holding and reasoning of *Yates* and on Department of Labor regulatory and advisory authority. Citing *Yates,* the Fifth Circuit held that Congress intended working owners to qualify as plan participants and that ERISA permits working owners to have dual status as employers and as employees under the statute. 2004 U.S. App. Lexis 6937, *6 and *9. The Fifth Circuit then followed the analysis used in *Yates* by looking to the Labor Department regulatory and advisory authority and reached the following holding:

> The advisory opinions, in accord with *Yates*, lead to the conclusion that shareholders in a multiple-shareholder corporation, such as Sharpless, are employees under ERISA. The Provident Plan was further covered by ERISA as an employer-sponsored plan in which at least one employee participated, and the district court did not err in holding that ERISA governed Sharpless's Policy.

Id. at *9.

The Fifth Circuit's reliance on *Yates* directly rebuts respondent's argument that *Yates* has nothing to do with this case. Indeed, the principles established in *Yates* that Congress intended working owners to qualify as employee/participants of benefit plans and that working owners may maintain dual status as employees and employers under ERISA are directly applicable to the question of the employee status of joint shareholders who are working owners of a corporate plan sponsor. Sharpless also makes clear that the Texas Court of Appeals erred in its reading of prior Fifth Circuit decisions on which it expressly relied in deciding this very issue.[4]

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[4] Absent reconsideration by the Texas Court of Appeals, there will also be a split between the state and federal courts in the Fifth Circuit on the federal issue.

Procedurally, this case is likely headed for trial on the issue of whether the policy covering the respondent also covered non-owner employees, whether petitioners properly denied respondent's claim for further disability benefits, and, if the case is tried under state law, whether petitioners' decision was in bad faith. This process will be lengthy and expensive. Unfortunately, if the Texas Court of Appeals could have had the benefit of this Court's analysis in *Yates* and had ruled correctly, the first issue would be irrelevant, the second issue would be decided on summary judgment based on the written record, and the bad faith claim would be dismissed. At this juncture, before the parties are required to incur substantial additional time and expense, the Texas Court of Appeals should be required to reconsider the issue presented in the petition in light *Yates v. Hendon*.

CONCLUSION

For the foregoing reasons and for the reasons previously stated, Petitioners respectfully request that this Court grant the petition for writ of certiorari.

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